

No. 1-12-2795

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

123 MADISON STREET CORP <sup>1</sup> ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 M1 723838
	)	
POWER & DIXON,	)	Honorable
	)	Martin P. Moltz,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Cunningham and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirmed the trial court's judgment in favor of plaintiff on its claim for unpaid rent against defendant where: (1) defendant failed to meet its burden of showing that plaintiff was not in privity of contract with it; (2) plaintiff substantially performed the material terms of the lease; and (3) the trial court's judgment was not contrary to the plain language of the lease.

¶ 2 This case originally began as a forcible entry and detainer action brought by Cagan

---

<sup>1</sup>Although defendant-appellant's brief lists "Cagan Management and 123 West Madison Corp." as the plaintiffs-appellees, the record indicates 123 Madison Street Corp. was substituted as plaintiff during trial and is the only appellee.

No. 1-12-2795

Management Group, Inc. (Cagan) against defendant, Power & Dixon, in which Cagan sought possession of the commercial premises located at 123 West Madison Street as well as unpaid rent. Power & Dixon vacated the premises, and the cause continued on the unpaid rent claim only. During the bench trial on the claim for unpaid rent, 123 Madison Street Corp. was substituted as plaintiff. Following all the evidence, the trial court ruled in favor of 123 Madison Street Corp. and awarded damages of \$69,281.60 plus costs. On appeal, Power & Dixon contends we should reverse the trial court's judgment because: (1) 123 Madison Street Corp. was not in privity of contract with Power & Dixon and so is not entitled to unpaid rent under the lease; (2) 123 Madison Street Corp. failed to establish a necessary element of its cause of action for unpaid rent, namely, that it had substantially performed all material terms of the lease; and (3) the trial court's judgment was contrary to the plain language of the lease. We affirm.

¶ 3 Cagan filed a forcible entry and detainer action in October 2010 seeking possession of the commercial premises located at 123 West Madison Street in Chicago, which the law firm of Power & Dixon had leased for location of its law offices. Cagan also sought \$48,659 rent/damages from Power & Dixon plus use and occupancy (\$6,874/month) through the time of trial and the costs of this suit.

¶ 4 On October 26, 2010, the trial court entered a default judgment against Power & Dixon. Power & Dixon subsequently moved to vacate the default judgment, which the trial court granted on December 8, 2010. In its order vacating the default judgment, the trial court stated it "finds that the subject premises has been vacated and Plaintiff may immediately re-enter; all items of personal property of Defendant are deemed abandoned." The trial court gave Power & Dixon 14 days to

No. 1-12-2795

answer the complaint.

¶ 5 On December 22, 2010, Power & Dixon filed an answer stating it had vacated the premises at 123 West Madison Street and therefore was not unlawfully withholding possession thereof from Cagan. Power & Dixon asked the trial court to deny Cagan's request for \$48,659 in unpaid rent.

¶ 6 Power & Dixon also filed counterclaims against Cagan alleging fraud and unjust enrichment. In support, Power & Dixon alleged that on August 27, 2002, it contracted with 123 West Madison, LLC, to lease the premises at 123 West Madison in Chicago. According to Power & Dixon, the parties entered into a first amendment to the lease agreement on April 23, 2004, and a second amendment on September 12, 2005. The September 12 amendment relocated Power & Dixon from suite 900 (the original premises) to a suite with additional square footage, suite 1900 (the replacement premises) at 123 West Madison Street. Power & Dixon was informed by 123 West Madison, LLC, that the replacement premises was approximately 3,731 square feet. Power & Dixon was required to pay a higher rent after moving into the replacement premises with the additional square footage because its rent was calculated "by multiplying cost per square foot of rental space by the amount of square feet actually leased by a tenant."

¶ 7 Power & Dixon stated in its counterclaims that it moved into the replacement premises on October 1, 2005. Subsequent thereto, "upon information and belief," 123 West Madison, LLC, sold the property located at 123 West Madison (including the replacement premises) to Cagan. 123 West Madison, LLC, subsequently re-purchased the property.

¶ 8 Power & Dixon further stated in its counterclaims that in September 2010, it had a "survey performed and a floor plan generated regarding the replacement premises." The floor plan was

No. 1-12-2795

completed on or about September 20, 2010, and indicated the square footage of the replacement premises is approximately 2,827 square feet, nearly 1,000 less square feet than indicated in the September 12th amendment to the lease.

¶ 9 In count I of its counterclaims, Power & Dixon sought damages against Cagan under a theory of fraud. Power & Dixon alleged Cagan "as successor in interest to the Madison property knew and/or should have known that the replacement premise was not 3,731 square feet worth of rental space" and that "Cagan in bad faith" made said representation to Power & Dixon and overcharged it for approximately five years. Power & Dixon sought compensatory damages of \$100,000 which allegedly represented the amount of rent overcharged by Cagan.

¶ 10 In count II of its counterclaims, Power & Dixon sought \$100,000 in damages against Cagan under a theory of unjust enrichment, alleging it would "be inequitable to allow Cagan to retain the benefit of the overpaid funds as they have not been earned."

¶ 11 In counts III and IV of its counterclaims, Power & Dixon brought similar claims of fraud and unjust enrichment against 123 West Madison, LLC.

¶ 12 Cagan brought a combined motion to dismiss counts I and II of Power & Dixon's counterclaims pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 5/2-619 (West 2010)). Cagan noted that the essence of Power & Dixon's counterclaims was that Power & Dixon had paid rent for 3,731 square feet of space but was only provided 2,827 square feet of space. Pursuant to section 2-619(a)(9), Cagan argued for dismissal of counts I and II of Power & Dixon's counterclaims because section 33 of the August 27, 2002, lease entitled "Waiver of Jury Trial and Counterclaim" stated that Power & Dixon agreed to "not interpose any

No. 1-12-2795

counterclaim (except compulsory counterclaims) of whatever nature or description in any such proceedings \*\*\* brought by Landlord on any matters whatsoever arising out of or in any way connected with this Lease, the relationship of Landlord and Tenant, Tenant's use or any proceedings for nonpayment of any rent." Cagan argued that "[b]ased on the clear waiver contained in the agreement between the parties," counts I and II of the counterclaims are barred and must be dismissed in accordance with section 2-619(a)(9).

¶ 13 In the alternative, Cagan argued count I of Power & Dixon's counterclaims alleging fraud should be dismissed pursuant to section 2-615. Cagan noted that in count I, Power & Dixon asserted "on information and belief" that Cagan purchased the subject property and therefore became subject to any and all claims regarding the lease. Cagan argued that said assertion was erroneous, as "Cagan does not now and never did own the subject property." Cagan further argued that even if it had purchased the property, count I of Power & Dixon's counterclaims failed to state a cause of action against it for fraud.

¶ 14 Also in the alternative, Cagan argued count II of Power & Dixon's counterclaims alleging unjust enrichment should be dismissed pursuant to section 2-619(a)(9) because Power & Dixon's rent payments were not tied to the square footage of the premises and thus it was not overcharged for rent during the relevant time period.

¶ 15 Power & Dixon filed a response to Cagan's motion to dismiss the counterclaims, arguing in pertinent part that Cagan's assertion that it has never owned the subject premises raises the question as to whether Cagan has standing to pursue the current action for recovery of unpaid rent. Power & Dixon requested the trial court to dismiss Cagan's complaint against it for lack of standing pursuant

No. 1-12-2795

to section 2-619.

¶ 16 On April 7, 2011, the trial court entered a written order granting Cagan's motion to dismiss counts I and II of Power & Dixon's counterclaims without prejudice pursuant to section 2-619. The trial court did not explicitly rule on Power & Dixon's request to dismiss Cagan's complaint for lack of standing.

¶ 17 Trial commenced on February 7, 2012. During opening statements, Cagan stated it was seeking \$69,281.60 in unpaid rent from Power & Dixon, "which would be the amount of nonpayment from approximately May of 2009 through the end of December 2010." Power & Dixon objected to the trial court's "jurisdiction," stating Cagan has "had possession of the premises for a while. Based on the amount they are seeking, as well as the fact they \*\*\* already have possession, this should be a breach of contract matter in the law division." The trial court noted that although "most cases of \$50,000 and over go to the law division, it's not an absolute mandatory requirement on the judge." Noting that this case was "really fairly simple," the trial court denied Cagan's motion to transfer the case to the law division.

¶ 18 At trial, Cagan called Berve Power, a principal in the law firm of Power & Dixon, as an adverse witness. Mr. Power testified that in 2002 Power & Dixon entered into a lease agreement with 123 West Madison, LLC. The lease was submitted to the trial court and is included in the record on appeal. The lease is dated August 27, 2002, and states that it is between 123 West Madison, LLC, and Power & Dixon. The lease provides that 123 West Madison, LLC is leasing to Power & Dixon a suite located at 123 West Madison Street in Chicago, "commonly described as Suite 900 (being approximately 1,250 rentable square feet)". The term of the lease was for seven

No. 1-12-2795

years, commencing on October 1, 2002, and terminating on September 30, 2009. The monthly base rent is set forth as follows:

October 1, 2002 through September 30, 2003	\$1,771
October 1, 2003 through September 30, 2004	\$1,824
October 1, 2004 through September 30, 2005	\$1,879
October 1, 2005 through September 30, 2006	\$1,935
October 1, 2006 through September 30, 2007	\$1,993
October 1, 2007 through September 30, 2008	\$2,053
October 1, 2008 through September 30, 2009	\$2,114

¶ 19 Section 32 of the August 27, 2002, lease states in pertinent part:

"In the event Tenant desires to relocate into larger premises within the Building, said larger premises being at least 1,875 rentable square feet, ('Relocation Premises'), Tenant shall notify Landlord of its desire to so relocate ('Relocation Request) and Landlord shall, within thirty (30) days after receipt of Tenant's Relocation Request, inform Tenant of the availability of space ('Relocation Notice') in the Building which meets the criteria of the Relocation Premises ('Potential Premises'). If a Potential Premises exists and Landlord is not, at that time, negotiating a lease with any other party \*\*\* for said Potential Premises, then Tenant shall, within ten (10) days of Landlord sending to Tenant the Relocation Notice , either accept or reject said Potential Premises upon the terms hereinbelow stated.

Tenant shall be granted possession of said Relocation Premises effective the date so indicated in Landlord's Relocation Notice ('Relocation Date') upon the following conditions:

No. 1-12-2795

(i) monthly Base Rent for the Relocation Premises shall be at the then current per square foot rate for the Premises and shall increase each year of the Term, as extended, by three percent (3%) per year."

¶ 20 Mr. Power testified that in April 2004, Power & Dixon and 123 West Madison, LLC, entered into an amendment to the lease (the first amended lease). The first amended lease was submitted to the trial court and is contained in the record on appeal. The first amended lease is dated April 23, 2004, and states that "[e]xcept as amended herein, the [August 27, 2002, lease] shall remain in full force and effect in accordance with its terms." The first amended lease provides that "[o]n or before May 1, 2004 (the 'Relocation Date'), the Premises leased under the Lease shall be relocated to Suite 905 (approximately 2,433 rentable square feet) within the Building (the 'Replacement Premises'), and [Power & Dixon] shall then be granted possession of same, and, except as otherwise provided herein, all duties and obligations of [Power & Dixon] under the Lease relative to the Premises shall be duties and obligations relative to the Replacement Premises." The monthly base rent for the replacement premises is set forth as follows:

Relocation Date through September 30, 2004	\$3,550
October 1, 2004 through September 30, 2005	\$3,657
October 1, 2005 through September 30, 2006	\$3,766
October 1, 2006 through September 30, 2007	\$3,879
October 1, 2007 through September 30, 2008	\$3,996
October 1, 2008 through September 30, 2009	\$4,116

¶ 21 Mr. Power testified that in September 2005, Power & Dixon and 123 West Madison, LLC

No. 1-12-2795

entered into a second amendment to the lease (the second amended lease). The second amended lease was submitted to the trial court and is contained in the record on appeal. The second amended lease is dated September 12, 2005, and provides that "[e]xcept as amended herein, the [August 27, 2002 lease and first amended lease, collectively referred to as the Lease] shall remain in full force and effect in accordance with its terms." The second amended lease states "[o]n or before October 1, 2005 (the 'Relocation Date'), the Premises leased under the Lease shall be relocated to Suite 1900 (approximately 3,731 rentable square feet) within the Building (the 'Replacement Premises'), and [Power & Dixon] shall then be granted possession of same, and, except as provided herein, all duties and obligations of [Power & Dixon] under the Lease relative to the Premises shall be duties and obligations relative to the Replacement Premises." The monthly base rent for the replacement premises is set forth as follows:

Relocation Date through October 31, 2006	\$5,776
November 1, 2006 through October 31, 2007	\$5,949
November 1, 2007 through October 31, 2008	\$6,127
November 1, 2008 through October 31, 2009	\$6,311
November 1, 2009 through October 31, 2010	\$6,501

¶ 22 Mr. Power testified that on March 13, 2006, Power & Dixon and 123 West Madison, LLC, entered into a third amendment to the lease (the third amended lease). The third amended lease was submitted to the trial court and is contained in the record on appeal. The third amended lease states "[e]xcept as amended herein, the [August 27, 2002, lease, the first amended lease, and the second amended lease, collectively referred to as the Lease] shall remain in full force and effect in

No. 1-12-2795

accordance with its terms." The third amended lease extended the lease term for suite 1900 through December 31, 2010, but did not alter the square footage of the unit or the rent for the unit.

¶ 23 Mr. Power testified that at some point in time, Power & Dixon fell behind on the lease payments to 123 West Madison, LLC. When asked whether Power & Dixon first fell behind on the lease payments in May 2009, Mr. Power testified he could not recall. Mr. Power further testified there was no language in the August 27, 2002, lease or in the second and third amended leases indicating that the rent was based on a per square footage figure, *i.e.*, there was no language indicating Power & Dixon would pay "so much per square footage."

¶ 24 On cross-examination, Mr. Power testified Power & Dixon entered into the August 27, 2002, lease and into each amended lease with 123 West Madison, LLC, *not* with Cagan. Mr. Power further testified he had been mistaken when he testified on direct examination that the August 27, 2002, lease contained no language indicating Power & Dixon would pay a per square foot amount for the space rented. Mr. Power testified that section 32 of the August 27, 2002, lease contained such language and that, in fact, he "did understand that the money [Power & Dixon was] paying was a per square foot amount for the space."

¶ 25 Mr. Power testified that, according to the second amended lease, Power & Dixon was supposed to be renting premises (Suite 1900) with 3,731 square feet. Mr. Power testified he has since learned that Suite 1900 was not 3,731 square feet, but was almost 1,000 square feet less, and that as a result he believes 123 West Madison, LLC, overcharged Power & Dixon for rent.

¶ 26 On re-direct examination, Mr. Power testified that Cagan sent Power & Dixon invoices for rent, but that Mr. Power's "belief" was that Power & Dixon was paying rent to 123 West Madison,

No. 1-12-2795

LLC.

¶ 27 Cagan called Joseph Gottesman, chief financial officer for Cagan, as a witness. Mr. Gottesman testified in pertinent part as follows:

"Q. Can you tell us, sir, what relationship Cagan Management had to 123 West Madison [LLC]?

A. Cagan Management Group managed the property for the former owner. We were appointed by the court to manage the property for Monsano Capital Management. Then the property went into receivership in 2009. Jeffrey Cagan was appointed receiver and managed the property on behalf of the receiver. And then when \*\*\* the receiver was dismissed, the bank became owner of the property. We took over—we became the manager of the building for the bank, and that's where we stand today in the same capacity.

Q. And so during the time that you managed this building at 123 West Madison, were rent checks made out to Cagan Management?

A. Rent checks were either made out in the beginning to Monsano Capital Management at the beginning, as they were instructed. And then either to Cagan Management Group or to 123 [West] Madison [LLC].

\* \* \*

Q. \*\*\* [W]hen did Cagan become the entity that tenants at 123 West Madison would pay rent to?

A. In May of 09."

¶ 28 Mr. Gottesman testified he had kept track of the payments made by Power & Dixon, and that

No. 1-12-2795

Power & Dixon owed \$69,281.60 in unpaid rent for Suite 1900.

¶ 29 On cross-examination, Mr. Gottesman testified that neither Cagan nor 123 West Madison, LLC, were the current owners of the subject premises; rather, 123 Madison Street Corp. was the current owner. Cagan has a management agreement with 123 Madison Street Corp. that provides that an action to enforce the terms of the lease may be commenced by the manager in the name of the owner. Mr. Gottesman testified that the August 27 lease and the subsequent amended leases were agreements between Power & Dixon and 123 West Madison, LLC, and were *not* agreements between Power & Dixon and Cagan.

¶ 30 On re-direct examination, Mr. Gottesman was asked if 123 Madison Street Corp., the owner of the premises, had given Cagan authority to institute a lawsuit for the purpose of collecting rent. Mr. Gottesman responded affirmatively, although he was unsure whether the authority was in writing, or whether it was "oral authority."

¶ 31 Following Mr. Gottesman's re-direct examination, counsel for Power & Dixon stated:

"Well, Judge, I was—if the plaintiff is resting their case, \*\*\* I was going to make a motion for a directed finding based on testimony that we have heard so far. And the authority of these plaintiffs to come and demand money from Mr. Dixon. I think there is a real problem here. How does this plaintiff [Cagan] have standing, a management company, when they have already admitted we have no agreement with them?"

¶ 32 Recognizing that this was a "significant issue," the trial court continued the case to February 29, 2012, for argument. At the hearing on February 29, counsel for Cagan stated he was making a motion to amend the complaint to substitute 123 Madison Street Corp. as the plaintiff. Over Power

No. 1-12-2795

& Dixon's objection, the trial court granted the motion to substitute 123 Madison Street Corp. as the plaintiff and eventually continued the case to May 8, 2012. Power & Dixon did not amend its answer or counterclaims following 123 Madison Street Corp.'s substitution as plaintiff.

¶ 33 On May 8, 2012, defendant called Kimshasa Baldwin as a witness. Ms. Baldwin testified she is a licensed architect who was contacted by Mr. Power to measure the square footage of Suite 1900 at 123 West Madison in Chicago. After measuring Suite 1900, Ms. Baldwin determined its actual square footage was 2,791 square feet. The square footage of the entire 19th floor, including areas outside of Suite 1900 such as the elevator lobby and exit stairwell, was 3,415 square feet.

¶ 34 On cross-examination, Ms. Baldwin testified she measured Suite 1900 on September 20, 2010. Ms. Baldwin further testified that she understood Power & Dixon was renting the whole 19th floor, and her measurements indicated that the 19th floor measured 3,415 square feet.

¶ 35 On re-direct examination, Ms. Baldwin again testified that Suite 1900 measured 2,791 square feet.

¶ 36 Defendant called Mr. Power, the managing attorney of the law firm of Power & Dixon, as a witness. Mr. Power testified Power & Dixon entered into a lease agreement with 123 West Madison, LLC, in August 2002, and subsequently entered into three amended lease agreements with 123 West Madison, LLC; Power & Dixon never entered into a lease agreement with either Cagan or with 123 Madison Street Corp.

¶ 37 Mr. Power testified the lease in August 2002 was for Suite 900 on the 9th floor of 123 West Madison. Power & Dixon stayed in that location for about two years and then moved to a different suite on the same floor that had almost twice as much space. In 2005, Power & Dixon moved to the

No. 1-12-2795

19th floor. Mr. Power testified:

"Q. And were there any other suites on the 19th floor other than the suite that was going to be rented to Power & Dixon?

A. No.

Q. And did you, in fact, rent that suite?

A. We did.

Q. And when you rented that suite were there negotiations as to what would be the agreement?

A. Yes.

Q. What was the agreement?

A. The agreement was—in fact, before we got there there was discussion with the same agent, the same agent that was the agent that did our negotiations when we came to the first suite on 900. And the discussion dealt with how much a square footage we would pay for that space. And we negotiated that along with rent abatement, which is in the lease.

\* \* \*

Q. Mr. Power, what was your understanding of what the square footage amount would be that you would be paying for?

A. \$18.50 per square foot.

\* \* \*

Q. To your knowledge does the contract, the first lease agreement rather, does it make reference to payment based on square footage?

No. 1-12-2795

A. It does.

Q. Can you identify that in the contract for me please.

A. Paragraph 32.

\* \* \*

Q. And can you read the language that makes reference to payment based on a square footage rate?

\* \* \*

A. Tenant shall be granted possession of said Relocation Premises effective the date so indicated in Landlord's Relocation Notice ('Relocation Date') upon the following conditions: (i) monthly Base Rent for the Relocation Premises shall be at the then current square foot rate for the Premises and shall increase each year of the Term, as extended, by three percent (3%) per year.

\* \* \*

Q. Was there a discussion that you had with the people who presented this document to you as to what that paragraph meant and what the square footage would actually be?

A. Absolutely.

Q. What was that square footage?

A. \$18.50 a square foot.

Q. And that was the then current square foot rate for that premises?

A. That's what we negotiated."

¶ 38 Mr. Power testified that although they negotiated \$18.50 per square foot, he subsequently

No. 1-12-2795

learned 123 West Madison, LLC, was charging \$18.58 per square foot.

¶ 39 Mr. Power testified that per the lease agreement, the "rentable square footage" for Suite 1900 was 3,731 square feet. When Ms. Baldwin measured Suite 1900, though, she determined that its square footage was only 2,791 square feet. The square footage for the entire 19th floor was 3,415 square feet, which included areas that did not fall within "rentable square footage," including the exit stairwell and building closets.

¶ 40 Defense counsel showed Mr. Power defense exhibit number 3, a document prepared by Power & Dixon that is contained in the record on appeal. The document shows that Power & Dixon paid \$5,776 per month during the first year of its second amended lease of Suite 1900, which was calculated by multiplying the 3,731 square feet it was supposed to be renting by \$18.58 per square foot and then dividing by 12. The total amount of rent paid by Power & Dixon during that first year was \$69,312 (\$5,776 multiplied by 12 months). With the rent increasing 3% per year, Power & Dixon paid \$5,949 per month the second year to lease Suite 1900 (\$71,388 for the year), \$6,127 per month the third year to lease Suite 1900 (\$73,524 for the year), \$6,311 per month the fourth year to lease Suite 1900 (\$75,732 for the year), and \$6,501 per month the fifth year to lease Suite 1900 (\$78,012 for the year), for a total of \$367,968 for the five years.

¶ 41 Power & Dixon determined it was actually leasing 940 square feet less than it had contracted for (the 3,731 square feet contracted for minus the 2,791 square feet actually received), which amounted to 11,280 square feet per year (940 square feet multiplied by 12 months), and 56,400 square feet over five years (11,280 square feet multiplied by five years). Power & Dixon calculated that this amounted to 25% less space than identified in the lease, meaning it had been overcharged

No. 1-12-2795

by 25% over the course of the five years, for a total overcharge of \$91,992 (\$367,968 multiplied by 25%).

¶ 42 After defense counsel stated he had no further questions, the trial court questioned Mr. Power as follows:

"Q. If they had told you it was 2,500 square feet would you have—do you recall at the time if you would have said, 'No, I can't do that because I need more...'

A. No. If they said that the floor was 2,500 I would have still taken the floor. But what they said was I was going to pay \$18.50 per square foot. That was really secondary. It was really we need this space. So if they represented that it was 2,500 I would have been able to do the math to say well at 2,500 square feet at \$18.50 a square foot my rent should be this amount. So the only difference is if they had represented that it was 2,500 square feet I would have had the ability to do the math and determine based on the per square foot amount as the contract says how much I should have been paying. So I relied on the representation of the 3,731, but I will tell the court that if they said it was 1,800 square feet I would have taken the whole floor but I would have been able to calculate what my rent should have been."

¶ 43 On cross-examination by plaintiff, Mr. Power testified that when he gave his deposition in this case, he did not remember the amount of money Power & Dixon agreed to pay per square foot, but that his recollection had since been refreshed and he now remembered they agreed on a figure of \$18.50 per square foot. Mr. Power further testified that none of the leases contains an explicit, per square foot figure that Power & Dixon agreed to pay. Mr. Power explained he did not ask to

No. 1-12-2795

have the figure put in the leases because he "could calculate it based on the square footage that was represented and the rent amount."

¶ 44 Following Mr. Power's testimony, the defense rested. The trial court continued the case to June 4, 2012, to hear the testimony of any rebuttal witnesses and to hear closing arguments. The appellate record contains no transcripts from the June 4, 2012, proceedings. The appellate record does contain a written order entered by the trial court on June 5, 2012, stating: (1) plaintiff's motion to present rebuttal witnesses was denied; (2) judgment was entered in favor of plaintiff, 123 Madison Street Corp., for \$69,281.60 plus costs; and (3) the cause was continued for a hearing on plaintiff's petition for attorney fees. There are no transcripts in the appellate record from June 5, 2012. On August 16, 2012, the trial court entered judgment for plaintiff for attorney fees in the amount of \$12,972. Power & Dixon filed a timely notice of appeal on September 17, 2012, arguing that the trial court erred in entering judgment against it following trial; no argument is made with regard to the denial of its counterclaims.

¶ 45 First, Power & Dixon argues that 123 Madison Street Corp.'s claim against it for unpaid rent for Suite 1900 was effectively one for breach of contract, which the trial court should have denied because they never entered into a contractual relationship with each other; rather, the contractual relationship was entered into by 123 West Madison, LLC, (an entity separate from 123 Madison Street Corp.) and Power & Dixon. Specifically, 123 West Madison, LLC, contracted to rent Suite 1900 to Power & Dixon under the second amended lease dated September 12, 2005, and under the third amended lease dated March 13, 2006. Power & Dixon argues that since 123 Madison Street Corp. did not enter into the second and third amended leases, it may only recover for unpaid rent

No. 1-12-2795

thereunder if it received a valid assignment of those leases effectively putting it into the shoes of 123 West Madison, LLC, and establishing privity of contract with Power & Dixon. Since 123 Madison Street Corp. failed to make the requisite showing of lease assignment/privity of contract, Power & Dixon argues we should reverse the trial court's judgment in 123 Madison Street Corp.'s favor.

¶ 46 We begin our analysis by discussing the doctrine of privity of contract. "Privity of contract or estate has been defined as 'mutual *or successive* relationship to the same rights of property.' (Emphasis added.) [Citations.] The relationship may be by operation of law, by descent, or by voluntary or involuntary transfer. [Citation.] Privity of contract is '[t]hat connection or relationship which exists between two or more contracting parties.' [Citation.]" *Collins Co., Ltd. v. Carboline Co.*, 125 Ill. 2d 498, 511 (1988).

¶ 47 "While '[p]rivty requires that the party suing has some contractual relationship with the one sued' [citation], privity accompanies a valid assignment of the contract. For example, if a lessee's assignee assumes the lease obligations, privity of contract between assignee and lessor has been held to result. [Citation.] \*\*\* According to one view, '[p]roperly understood, privity is only a means of protecting a party guilty of breach against losses suffered by remote parties which are unanticipated and therefore not included in the calculation of costs.' [Citations.]" *Id.* at 511-12.

¶ 48 "Once made, an assignment puts the assignee into the shoes of the assignor. [Citations.] Because the assignor was in privity with the opposite contracting party, so is the assignee." *Id.* at 512.

¶ 49 In the present case, Power & Dixon argues that 123 Madison Street Corp. bore the burden of establishing a valid assignment of the second and third amended leases so as to establish privity

No. 1-12-2795

of contract. Power & Dixon further contends 123 Madison Street Corp. failed to meet its burden establishing privity of contract, and therefore was not entitled to judgment in its favor.

¶ 50 We disagree that 123 Madison Street Corp. bore the burden of establishing privity of contract. The issue of privity of contract is one of standing. See *Haake v. Board of Education for Township High School Glenbard District 87*, 399 Ill. App. 3d 121, 128-29 (2010) ("[G]enerally speaking, only a party to the contract, one in privity with a party to the contract, or a third-party beneficiary of the contract has standing to sue on a contract"); *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶18 ("Generally, for standing purposes only a party to a contract, or one in privity with a party, may sue on a contract"). "Lack of standing is generally considered an affirmative defense and it may be raised in a motion to dismiss filed pursuant to section 2-619." *Id.* at ¶13. "A defendant has the burden to both plead and prove the plaintiff's lack of standing." *Id.* at ¶16.

¶ 51 Thus, the defendant here, Power & Dixon, bore the burden of pleading and proving 123 Madison Street Corp. lacked standing/privity of contract based on its failure to receive a valid assignment of the second and third amended leases. Power & Dixon failed to meet its burden. The record reflects that Cagan moved to substitute 123 Madison Street Corp. as a plaintiff in this case after Mr. Gottesman's testimony at trial that 123 Madison Street Corp. was the current owner of the subject property. Power & Dixon objected at trial on the basis that it had "never heard of" 123 Madison Street Corp; however, Power & Dixon made no specific objection based on 123 Madison Street Corp.'s alleged lack of standing/privity of contract for failure to receive a valid assignment of the second and third amended leases. The trial court granted Cagan's motion to substitute 123

No. 1-12-2795

Madison Street Corp. as plaintiff but continued the trial for several weeks so as to allow Power & Dixon to "speak to his client [Mr. Power] and see what, if any, different questions he might want to ask than what he was going to." When the trial resumed, Power & Dixon called two witnesses, Ms. Baldwin and Mr. Power, neither of whom gave any testimony regarding whether 123 Madison Street Corp. had a valid assignment of the second and third amended leases, *i.e.*, whether it was in privity of contract with Power & Dixon so as to have standing to sue. Power & Dixon never filed an affirmative defense or motion to dismiss against 123 Madison Street Corp. based on lack of standing and privity of contract. As such, Power & Dixon failed to meet its burden of pleading and proof on this issue, and therefore it cannot now argue that the trial court's judgment in favor of 123 Madison Street Corp. should be reversed based on standing/privity of contract grounds.

¶ 52 Next, Power & Dixon argues that even assuming 123 Madison Street Corp. was in privity of contract with it and had standing to sue for unpaid rent for Suite 1900 under the second and third amended leases, 123 Madison Street Corp. still failed to comply with all material terms of the second amended lease and therefore was not entitled to a favorable judgment. "The rule of law is that a party seeking to enforce a contract has the burden of proving it has substantially complied with all material terms of the agreement. [Citation.] 'A party who materially breaches a contract cannot take advantage of the terms of the contract that benefit him, nor can he recover damages from the other party to the contract.' [Citation.]" *MHM Services, Inc. v. Assurance Co. of America*, 2012 IL App (1st) 112171, ¶48.

¶ 53 Power & Dixon argues that the second amended lease required that it be provided with approximately 3,731 rentable square feet in Suite 1900, and that this square footage provision

No. 1-12-2795

remained in effect even after the parties entered into the third amended lease, which extended the lease term but did not alter the square footage of the unit. Power & Dixon contends it was only provided with 2,791 rentable square feet and, as such, that 123 Madison Street Corp. materially breached the contract and therefore cannot recover damages against Power & Dixon for unpaid rent.

¶ 54 We disagree. At trial, Mr. Power testified, in response to questioning from the trial court, that in 2005 Power & Dixon had increased its number of attorneys and needed more space than the 2,433 square feet it was then renting in the building at 123 West Madison Street. Mr. Power further testified:

"Q. At [the time you signed the second amended lease in 2005] were you concerned or even aware of square footage? Was square footage something that you were actively thinking about? If you recall. I know you were talking about expanding.

A. Sure. I can say this. There's no way that I can even say I walked in and said I have to have this amount of square footage. What I said was we need space, do you have any more space in the building. And they took me to the 19th floor and we walked around and they told me that it was 3,731 square feet and I said we'll take it. So I did not go and say I must have this amount of square footage. \*\*\*

Q. If they had told you it was 2,500 square feet would you have—do you recall at the time if you would have said, 'No, I can't do that because I need more...'

A. No. If they said that the floor was 2,500 I would have still taken the floor."

¶ 55 Mr. Power's testimony indicates that what was material to Power & Dixon at the time it

No. 1-12-2795

signed the second amended lease was that Suite 1900 contain more than the 2,433 square feet it was then renting; as long as Suite 1900 contained more than 2,433 square feet, Power & Dixon would have agreed to rent it *regardless* of whether or not the square footage equaled the approximately 3,731 square feet referenced in the second amended lease. In other words, the testimony indicated that the pertinent material term of the second amended lease was that Suite 1900 contain more than 2,433 square feet. As Suite 1900 was found to have measured 2,791 square feet, 123 Madison Street Corp. was not in material breach of contract and the trial court's factual finding on this issue in favor of 123 Madison Street Corp. was not against the manifest weight of the evidence. See *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 55 (we defer to the trial court's factual findings unless they are against the manifest weight of the evidence).

¶ 56 Next, Power & Dixon argues that the trial court erred in finding that the rent owed for Suite 1900 was for a flat-rate irrespective of the square footage of the unit. Power & Dixon contends that pursuant to section 32 of the August 27, 2002, lease, the rent owed under all the leases was based on the square footage of the unit rented, that Power & Dixon paid \$367,968 over five years for Suite 1900 based on the 3,731 square feet it was supposed to be renting under the second amended lease, and that it was overcharged by 25% during those five years because it actually only received 75% of the space promised. Power & Dixon argues it was overcharged \$91,992 for the five years, which the trial court should have offset from the amount it allegedly owed to plaintiff.

¶ 57 We do not know the basis of the trial court's judgment, as there is no transcript in the appellate record for the date of its ruling, and the written judgment itself provides no explanation of its reasoning. To the extent the record on appeal is incomplete, we resolve any doubts against Power

No. 1-12-2795

& Dixon as the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 58 We further note that interpretation of the lease is a matter of law subject to *de novo* review. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005). The last paragraph of section 32 of the August 27, 2002, lease states it was "the intent of the parties that Tenant only relocate one time pursuant to this Paragraph." Thus, section 32 applies only to Power & Dixon's first relocation. The rent at issue here was paid for Suite 1900 pursuant to the second relocation, under the terms set forth in the second and third amended leases, neither of which provided that the rent payments were contingent on the square footage of the unit. Accordingly, the trial court did not err to the extent it found that the rent owed for Suite 1900 under the second and third amended leases was for a flat rate irrespective of the square footage of the unit.

¶ 59 Power & Dixon argues that Mr. Power's testimony during its direct examination of him compels a different result, as he testified there that the parties negotiated rent of \$18.50 payable per square foot for Suite 1900 pursuant to section 32 of the August 27, 2002, lease. 123 Madison Street Corp. objected at trial to Mr. Power's testimony on the basis that it constituted inadmissible parol evidence. The trial court overruled the objection, finding that the leases were contracts of adhesion to which the parol evidence rule did not apply.<sup>2</sup> However, even after hearing Mr. Power's testimony regarding the negotiated rent payments of \$18.50 per square foot for Suite 1900, the trial court ruled in favor of 123 Madison Street Corp. on its claim for unpaid rent, apparently finding Mr. Power's testimony to be incredible and contrary to the language of the second and third amended leases. We

---

<sup>2</sup>Neither party specifically addresses the issue of whether the trial court correctly determined that the leases were adhesion contracts to which the parol evidence rule does not apply. Accordingly, we need not address this issue.

No. 1-12-2795

will not substitute our judgment for the trial court's credibility determinations. *Staes and Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35.

¶ 60 For the foregoing reasons, we affirm the trial court.

¶ 61 Affirmed.